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RECORD NO. 87-1760

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

DIANA M. PERKINSON and FRANK N. PERKINSON, JR., t/a PERKINSON & PERKINSON, A PARTNERSHIP

Petitioners

v.

DONALD W. HUFFMAN, TRUSTEE FOR BILLY H. HARBOUR, DEBTOR; AND BLUEFIELD HOLDING COMPANY

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

The Petitioners reply to arguments first raised in the brief by the Respondents in opposition to the Petitioners' petition for a writ of certiorari.

1. THE PETITIONERS HAVE STATED GROUNDS WHICH JUSTIFY GRANTING A WRIT OF CERTIORARI

The Respondents cite two additional decisions holding there is no right of trial by jury in "core" proceedings brought in a bankruptcy court. *In Re Chase & Sanborn Corp.*, 54 B.R. 43 (S.D. Fla. 1985) and *In Re Reda, Inc.*, 60 B.R. 178 (N.D. Ill.—1986). The first case contains no reasoned opinions. In the latter case, the bankruptcy judge noted there was no preference at common law and accordingly a suit to recover a preference, even in terms of money damages, could not be an action at common law where right of trial by jury is preserved

by the Seventh Amendment. Specifically the Court held:

> "The debtor is not really seeking damages for an injury. Instead the debtor by pursuing a preference action is seeking to recover a sum of money improperly paid to the creditor..." 60 B.R. at page 181.

While a preference was not known at common law, when money was improperly paid and then sought to be recovered (whether it be from the tax collector or adverse party to a contract), the common law action was for money had and received also called indebitatus assumpsit or general assumpsit. See *Riverside Company v. Husted*, 109 Va. 688, 64 S.E. 958 (1909). *In Re Reda, Inc., supra,* also held the right of trial by jury was required on the second count dealing with a state law conversion and consequently should be tried by the district court . In that case, the preference count was tried by the bankruptcy

judge without a jury and the conversion claim was tried by the district judge with a jury. Here all nine claims by the Respondents against the Petitioners are asserted by three alternate theories. It is not known which of the three theories, if any, will prevail on each claim. The preference is the least likely theory of recovery and the voluntary conveyance under state law is the most likely theory of recovery of each claim. Thus the jury and non jury aspects cannot be divided even if there were no right of trial by jury for preferential claims.

The claims by the Respondents are against lawyers for allegedly over-charging their clients. If they did not overcharge in accordance with principles of state law, there could be no preferential payments or fraudulent payments or voluntary payments. Since one lawyer is not involved except as a partner, his entire

liability is regulated by the state law of dealing with partnerships. As Mr. Justice (now Chief Justice) Rehnquist wrote in his concurring opinion in *Northern Pipeline Company v. Marathon Pipe Line*, 458 U.S. 53, 73 L.2d 598, 102 Sup. Ct. 2858 (1981):

> "... The law suit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of traditional actions at common law tried by courts at Westminister in 1789." 450 U.S. at page 90.

The law suits called adversary proceedings in which the Petitioners herein were named defendants seeks damages for precisely the same reasons and then rephrases the same in terms of preferential transfers, fraudulent transfers and voluntary transfers; but there could be no such transfers unless there was a breach of contract or misrepresentation

about the legal fees. Suing a lawyer for overcharging a client is the "stuff" of traditional jury trials at common law.

11. RETENTION OF THE STATUTORY BANKRUPTCY SCHEME IS NOT A REASON TO UPHOLD THE DECISION BELOW.

The main reason for this reply brief is to answer the new argument of the Respondents citing footnote 7 of *In Re Reda, supra,* at page 180 stating the expeditious and cost effective administration of bankruptcy courts will be jeopardized if routine preference actions necessitate jury trials. This footnote in turn cites *In Re Best Pack Seafood, Inc.,* 45 B.R. 194 (D. Me. 1984). This latter decision held:

> "... Congress has apparently determined that core proceedings are proceedings dealing with 'restructing of debtor-creditor relations, which is at the core of the federal bankruptcy power..." 45 B.R. at page 194.

Since the Petitioners have filed no proof of claim as creditors of the Respondents, there is no debtor-creditor relationship. Instead the Petitioners are being sued by the Respondents for damages arising from tortious conduct under a previous contractual relationship with the Debtor. The decision also holds:

> "The added delay and expense of trial by jury of these core proceedings would frustrate the expeditious and effective administration of bankruptcy cases. Congress may accommodate the right of trial by jury to the need for expeditious proceedings. 45 B.R. at page 195.

If that be true, then Congress could apparently provide that persons charged with crimes could be forthwith sentenced to prison by police authorities because trial by jury is time consuming and expensive. The Petitioners suggest that trial by jury is the most perfect way to resolve a dispute and is neither time

consuming nor complicated when competent lawyers serve as adversaries and competent judges preside. The Petitioners suggest there is nothing routine about the Respondents suring them for damages totaling $125,713.49 (and an additional $144,060.81 in a second adversary proceeding pending the decision in this case). Even if the claims by the Respondents against them are bloated, a judgment in favor of the Respondents for a substantial portion of the claims would ruin the Petitioners financially and destroy two fine lawyers who have given years of service to the bar and the community. To deny them the right of trial by jury in a court of competent jurisdiction because an administrative decision would be more expeditious and cost effective is to disregard the Constitution and eliminate the need for courts. Furthermore people who understand the judicial

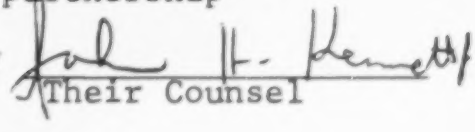
process know disputes are better settled when tried by an independent judiciary; and when the testimony of witnesses are in conflict, litigants (even those who lose) accept jury verdicts.

CONCLUSION

The Respondents argument first raised in the brief in opposition to the petition for a writ of certiorari that trial by jury in judicial courts must be eliminated in favor of expeditious administrative proceedings is an invitation to tyranny and must be rejected.

Respectfully submitted,

DIANA M. PERKINSON and
FRANK N. PERKINSON, JR.,
t/a Perkinson & Perkinson,
a partnership

By 
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PROOF OF SERVICE

The undersigned certifies he is a member of the bar of the Supreme Court of the United States and counsel of record for the Petitioners; and on May 27, 1988, he served this Reply Brief on the Respondents by mailing three true copies of same in an envelope by first class mail with postage thereon prepaid addressed to their counsel of record, Donald W. Huffman, Esquire, 123 Church Avenue, Southwest, Roanoke, Virginia 24011.

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